IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 18

DAVID FRIEDBERG,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR THE PETITIONER

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Brief

CITATIONS

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OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported in 207 Fed. (2d) 777.

JURISDICTION

The judgment of the Court of Appeals was entered on October 16, 1953, and the petition for rehearing was denied by the Court of Appeals on November 30, 1953, at which time the execution of the mandate was stayed pending filing of a Petition for Certiorari. The Petition for Certiorari was filed on December 28, 1953, and was denied on March 8, 1954. A Petition for Rehearing was filed on March 20, 1954, and was granted on June 8, 1954, on which date an order granting certiorari was entered.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254. See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure.

STATUTE AND RULES INVOLVED

The petitioner was convicted for alleged violations of the provisions of Title 26, Section 145(b), (Internal Revenue Code), which reads as follows:

> "(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution. [26 U. S. C. 1946 Ed., Sec. 145(b).]"

Rules 30 and 52(b) of the Federal Rules of Criminal Procedure, which read as follows, are likewise involved:

> "Rule 30.
>
> . . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."
>
> "Rule 52.
>
> (b) Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

QUESTIONS PRESENTED

1. Did the evidence establish the petitioner's basic net worth at the start of the taxable years in question sufficiently to present an issue for jury determination?

2. Did the District Court commit reversible error in permitting the revenue agent (Clager) to state his conclusions why no cash on hand was included in his computation of petitioner's net worth, prior to 1945?

3. Did the District Court commit reversible error in its supplemental instruction to the jury to compromise and adjust their differences?

STATEMENT OF CASE

Petitioner was indicted in the Southern District of Ohio for violation of Section 145(b) of the Internal Revenue Act in the years 1944, 1945, 1946 and 1947. The jury found petitioner not guilty on Count I (1944), and guilty on Count II (1945), III (1946) and IV (1947). The District Court imposed concurrent sentences of imprisonment for eighteen months on each of the three counts and a fine of $10,000 on Count II (R. 669).

This is one of the very first cases prosecuted strictly on an increased net worth basis, relying solely on circumstantial evidence. No attempt was made to show specific additional unreported income from petitioner's business, or from any other source, or to show unusual expenditures. The theory of the prosecution, evidenced in the net worth statement (Ex. 2, R. 38, 691), in argument, and in briefs, is that petitioner had no currency in his or his wife's possession at the end of 1941, 1942, 1943, or 1944, so that the assets on hand in 1947 could be the result only of failure to report income in 1944, 1945, 1946, and 1947. The critical importance of the currency item is heightened by the stipulation of defense counsel (R. 38, 120) that all items on the

net worth statement were correct with the sole exception of the treatment of cash and bonds. Therefore, the principal question presented is whether the starting point evidence which excluded cash on hand, proved the petitioner's starting point net worth sufficiently to present an issue for jury determination. The issue of the sufficiency of the evidence was challenged at appropriate times by motions for acquittal (R. 226, 640, 655), which were all overruled.

David Friedberg married Frances Handler in 1915 in New York, and moved to Dayton, Ohio, about two years later (R. 371). In 1922 or 1923 they moved to Columbus, Ohio, where they have resided ever since (R. 373). In about 1918, petitioner and two others formed a tailoring partnership (R. 29), which they incorporated under the name of the Buckeye Tailoring Co., in 1922, about the time they all moved to Columbus (R. 29, 371). Since 1941 petitioner has operated The Buckeye Tailoring Co., as an individual, and it has had the same location since that date (R. 372).

Apart from some real estate trading and developing in the nineteen twenties and the thirties (R. 179 et seq.), a small inheritance (R. 37), and a brokerage account with Vercoe and Company opened in February, 1936 (Ex. 2N, R. 38, 703), petitioner's income came from The Buckeye Tailoring Company. There is no claim of specific additional unreported income, but there is solely a reliance upon the prosecution theory that the petitioner had no cash on hand until 1945.

The origin of, and sole basis for, this theory is a speculative assumption and an arbitrary allocation, made by an inexperienced (R. 136-137) agent, of currency and bonds which petitioner had in his safety deposit box in 1947. On the occasion of the second visit to petitioner by an agent, and in response merely to a general question, petitioner voluntarily took the agent, and a deputy collector, to the

Market Exchange Bank and opened for their inspection a box which was in his wife's maiden name (R. 408-412), the existence of which was unknown to the agents (R. 85, 86). The box contained bonds in the face value of $53,625.00, and currency totalling $19,600.00 (R. 83, 82). The bonds were charged against the petitioner's income in the years in which they were purchased (R. 211-212), and the currency was listed as income in those years corresponding to the dates found on the binders which held the currency (R. 81-82; 115-116). The only reason for allocating $53,625.00 of bonds as income in the net worth years was the assumption that they were purchased from current earnings; the only reason for allocating $2,000.00 as 1945 income, $3,000.00 as 1946 income, and $14,600.00 as 1947 income, was the assumption that the first two items represented current income in the years marked in pencil on their paper binders, and that the $14,600.00 had to represent 1947 current income, since its paper binders bore no dates (R. 81-82; 116). The bond purchases account for practically all of the net worth increase (R. 208-209).

This arbitrary allocation of assets to income led, after three years of investigation, to an indictment (R. 1), with reported income, and claimed income and claimed understatements as follows:

	Reported		*Claimed*	
	Gross [1]	Net [2]	Net [3]	Understatement [4]
1944	$61,831.83	$2,735.97	$16,140.68	$13,404.71
1945	37,471.65	2,012.36	22,169.18	20,156.82
1946	58,782.36	4,943.93	23,035.34	18,091.41
1947	64,623.91	7,723.05	42,276.91	37,553.86

Since the prosecution did not question the expense items deducted on petitioner's return, Item 3 represented purely

[1] From Exhibits 1(b), 1(c), 1(d) and 1(e) (R. 67) *et seq.*).
[2] *Ibid.*
[3] From Record, page 204, wherein amounts vary slightly from those in indictment.
[4] Computed difference between 3 and 2.

a claimed income in excess of that reported. During this period petitioner was operating a business with three employees (R. 46, 380). The jury acquitted on Count One (1944), and found petitioner guilty on Counts Two (1945), Three (1946), and Four (1947), a rather strange decision in an increased net worth case.

The prosecution relied solely on circumstantial evidence to prove the starting point net worth and to justify its exclusion of cash on hand (R. 648). The evidence can be summarized as follows, with comments thereon later in the argument:

1. Loan—In 1931, petitioner borrowed $550.00 on his insurance policies (Ex. 4A; R. 15, 722).

2. Foreclosures—In 1934, foreclosure was had against Bedford Avenue property, and in 1934 against Sheldon Avenue property, both of which had formerly been owned by petitioner. In 1936, foreclosure was had against the Nelson Road property. A deficiency judgment therein was satisfied in 1939 for $100.00 (Ex. 6A and 6B; R. 18, 726, 729).

3. Levy of Execution—In 1936, execution was levied on a $13.76 Municipal Court judgment against petitioner, and a return of no goods was filed (Ex. 5A; R. 17, 724).

4. County Tax Returns--Between 1938 and 1946 petitioner filed no county personal property tax returns. He filed delinquent returns in 1947 for the years 1942 through 1947 (Ex. 30; fol. 1124, R. 759).

5. Income Tax Returns—The records of the Collector's Office (R. 671-688) show that, during the period 1924 through 1947, petitioner returned a taxable amount of income in eight years, returned no tax due in four years, and did not file a return in twelve years.

6. Loan Application—In 1939, petitioner filed an application for an F.H.A. loan, whereon he listed cash on hand of $150.00 (Ex. 7; R. 19, 732).

7. Corporate dissolution—In 1941, The Buckeye Tailoring Company voluntarily dissolved under Ohio law, and petitioner purchased the assets (R. 66-67).

8. Bookkeeping—Until November 30, 1944, Mrs. Appel kept the Buckeye books, on which date she resigned (R. 38-40). Since that date, petitioner's wife has kept the books (R. 278).

9. Friedberg Loan—From March 22, 1945, Mrs. Friedberg carried miscellaneous and stock suit sales under the erroneous, or inappropriate, book entries of "Friedberg Loan" (R. 169, 284-285).

10. Opinion Evidence—During cross-examination, not in response to the question of defense counsel, and over repeated objection (R. 138-143) an inexperienced (R. 136-137) special agent was permitted to argue to the jury, under the guise of presenting sworn factual testimony, his personal arguments and conclusions why petitioner could not have had currency on hand. This pre-opening argument was repeated to the jury on re-direct examination (R. 188-190), over futile objections.

Such evidence is quite remote and speculative, to present to a jury which has the power to deprive a man of his liberty. Therefore, in order to bolster the agent's theoretical allocation of currency and bonds to current income in the net worth years, the prosecution evolved another equally arbitrary theory—that unreported income was concealed by use of the Friedberg Loan bookkeeping entries. However, as shall be pointed out later, the Friedberg Loan theory was exploded by its author, special agent Clager, who admitted that all of the amounts listed under the Friedberg Loan entries were reported and treated as taxable income (R. 169).

Thus, the prosecution was left with Exhibit 7 (R. 19, 732), which the prosecution treated as an admission. But it is difficult to understand how a 1939 statement can

prove that petitioner did not possess cash until the end of 1945. In addition, a close examination discloses that the document actually does not constitute an admission.

Instead of sustaining defense motions which contended that there was insufficient evidence to present to the jury, the District Court confused a confounded jury, after four and one half weeks of trial, and on the second day of the jury's deliberation, by telling the jury "to compromise and adjust your differences and reach a verdict, if possible" (R. 653-654). Since objection was not made to this clearly erroneous supplemental charge, the question on this point is the effect of Rule 52(b) on Rule 30, Federal Rules of Criminal Procedure.

SUMMARY OF ARGUMENT

I

A.

The verdict of Guilty on Counts 2, 3 and 4 is not supported by substantial competent evidence. Evidence of the petitioner's starting point cash position consisted of remote circumstantial evidence, from which tortured inferences of status must be drawn, with unfounded assumptions that such status continued without change for as long as fifteen years, with a further inference to be drawn from such assumption. The effect of the assumption is to shift the burden of proof to a defendant in a criminal case, and the creation of the assumption violates the rule of *Maggio* v. *Zeitz*, 333 U. S. 56, at 65.

B.

To establish the starting point net worth, and to prove that petitioner's assets at the starting point did not include cash on hand, the prosecution offered an F.H.A. loan application (Ex. 7, R. 19, 752), which was asserted to be an admission by petitioner of his cash position. The

so called admission was signed at a time over six years before the date when the net worth computation could possibly permit the petitioner to have any cash on hand, and still be guilty. Respondent misunderstands the nature of the loan application. It is not an admission, but merely another parcel of circumstantial evidence, from which respondent can only attempt to infer a status, assume that the status continued over six years without change, and from the assumption infer a lack of cash. As such an item of circumstantial evidence, this exhibit is as insufficient as the remainder of the evidence, is more susceptible to an inference leading to innocence than one leading to guilt, would shift the burden of proof, and is contrary to the rule in *Maggio* v. *Zeitz*, 333 U. S. 56, 65.

II

In an answer which was not responsive to the question, and over the objection of cross-examining defense counsel, a special agent of meagre experience, who was not qualified as an expert, argued at length to the jury on his reasons and conclusions why the petitioner did not have any cash on hand until 1945, under the guise of testifying to facts. This argument was resumed on re-direct examination, over the repeated objection of defense counsel. Such conduct is far removed from the permissible analysis of bookkeeping records by a qualified accountant, and is highly prejudicial in that it misleads the jury into accepting argument as fact, and in that it permits the prosecution to argue its case to the jury on the sole important factual issue, cash, before all the evidence has been submitted.

III

The supplemental charge to the jury "to compromise and adjust your differences, and reach a verdict, if possible," is such a plain error or defect affecting substantial

rights as may be noticed, under Rule 52(b), Federal Rules of Criminal Procedure, even though the objection required by Rule 30 was not raised.

ARGUMENT

I

A.

The Verdict Is Not Supported by Substantial Competent Evidence.

"In a net worth case, the starting point must be based upon a solid foundation. . . ." *United States* v. *Chapman*, 168 F. (2d) 997, 1001, (C. A. 7), c.d. 335 U. S. 853. Controversial as the net worth method is, the proposition just quoted is not disputed, and it cannot be disputed. The net worth method is an accounting method for the reconstruction of income by approximation. The prosecution establishes the net worth at the beginning of a certain period, and at the end of the period, and then it becomes obvious that the increase from the former to latter figure could not have resulted from the income which the taxpayer reported. A computed difference between two figures is found to be irreconcilable with reported income. *It is assumed that the discrepancy consists of unreported income.* Therefore, a criminal conviction which rests on an assumption must be supported by a clearly proven starting point and termination point, or the entire proceeding becomes one of summary justice.

"The principal question presented relates to the adequacy of the starting point evidence to show that increases in petitioner's net worth during the years 1945, 1946 and 1947 could not have resulted from the investment of cash funds accumulated in earlier years." (p. 4, Brief of Respondent in Opposition to Certiorari.) To be even more specific, the sole basic factual issue in the trial was whether

approximately $75,000.00 in cash and bonds, which was voluntarily disclosed to the agents in 1947, represented the life savings of petitioner and his wife, as so testified by both the petitioner and his wife at the trial (R. 275, 430), or whether these items represented current, unreported, income in 1945, 1946 and 1947. Petitioner's counsel stipulated (R. 38, 120) that the net worth schedule (Ex. 2, R. 38, 691) was correct with the exception of the treatment of cash and bonds.

The arbitrary allocation of bonds and cash to current income in 1945, 1946 and 1947 was the decision of the inexperienced (R. 136-137) special agent in charge of the investigation, when he prepared (R. 115) the net worth schedule. He allocated bonds to current income in the year in which they were purchased (R. 211-212) and allocated some cash to current income in 1945 and 1946 because those dates appeared on the paper binders which held $2,000.00 and $3,000.00 respectively, and the rest in 1947 because the remaining $14,600.00 had no dates on its binders (R. 81-82, 115-116).

Such an arbitrary assumption and allocation required proof, and the prosecution proceeded into the trial feeling that it had such proof in the Friedberg Loan entries on the petitioner's books. Special agent Clager, the principal witness for the prosecution, devoted a major portion of his testimony in chief (R. 95-108) to the Friedberg Loan entries, and thirteen of the twenty four prosecution witnesses (R. 69-70) were called to testify on the Friedberg Loan issue. The special agent testified that he was assigned to the case on November 21, 1947 (R. 92), just after the October 10, 1947 (R. 79) visit to the box. One of his first discoveries was that, after the bookkeeper resigned, and Mrs. Friedberg took over the bookkeeping, the income from alterations was no longer entered in the cash receipts book

(R. 96). He then noticed the appearance, also beginning in 1945, of the Friedberg Loan entries (R. 96). He spent much time, and was able to identify certain people whose surnames appeared opposite items on bank deposit tickets into the Buckeye Tailoring Co. account (R. 98-108). It was established that these items, not listed as such in the cash receipts book, actually represented income, and most of those persons so testified (R. 69-70). The prosecution was jubilant, felt that here was their proof of unreported income, and introduced meager evidence on the starting point net worth.

But the case blew up on Clager's cross-examination. He admitted that for 1945, 1946 and 1947 the petitioner reported gross income which exceeded the income reflected on his books by almost exactly that amount which the Friedberg Loan entries totalled for the respective years (R. 162-166). If the Friedberg Loan items are added to the book income, "the totals compare favorably" (R. 167). As a matter of fact, the special agent admitted that, with the Friedberg Loan items added to book income, the returns show a $3,000.00 error in favor of the Government in 1945 (R. 163), a $1,700.00 error in favor of the Government in 1946 (R. 164), and a $1,300.00 error (after an acknowledged adjustment) against the Government in 1947 (R. 165). To complete the devastation of the theory that the Loan items were concealed income, the special agent admitted:

> "Q. And, not only does the evidence indicate that there were income items, but of more importance and greater importance is that Mr. Friedberg included each one of those D. Friedberg loans in his income tax sheets?
>
> A. He did that in effect by reporting what he did" (R. 169).

This admission destroyed any proof of specific items of unreported income, and left the prosecution with a simple,

but more difficult, burden of proving an unwarranted increase between a starting point which must be conclusively proven, and the termination point. The evidence which the prosecution had available to meet this unexpected burden was totally insufficient.

Actually, the prosecution did not have any personal knowledge of whether petitioner had cash on hand prior to 1945 (R. 140-143), or whether petitioner had any safety deposit boxes in addition to those which agent Clager investigated (R. 195). As a matter of fact, the prosecution's evidence concerning the starting point was entirely circumstantial as is illustrated in the following testimony of the special agent:

> "Q. Did Mr. Friedberg have extensive real estate transactions prior to 1944, and particularly in the early 1920's and in the 1930's?
>
> A. My examination of the courthouse records regarding real estate revealed that he acquired and disposed of several properties.
>
> Q. Did you give Mr. or Mrs. Friedberg credit for any cash arising from such transactions? You either did or didn't.
>
> A. *I was unable to determine the amount of cash which would arise*" (R. 149). (Emphasis added.)

While the necessity for enforcement of the tax laws is the reason given by most of those Courts of Appeals which give the Government carte blanche in the use of circumstantial evidence in criminal tax cases under the net worth method [cf. *United States* v. *Demetree*, 207 F. (2d) 892, 894 (CA 5)], this Court has only on rare occasions departed from the basic rule expounded by Justice Holmes in his dissent in *Olmstead* v. *United States*, 277 U. S. 438, 470: "I think it a less evil that some criminals should escape than that the Government should play an ignoble part."

The sparse evidence in this case shouts a defiance at this rule, demonstrates the ease with which a jury can convict an innocent man under the present usage of the net worth method, and distorts *United States* v. *Johnson*, 319 U. S. 503, beyond reason.

The viciousness of the present day net worth method is that it permits the Government, by establishing a prima facie case solely with highly circumstantial evidence, to shift the burden of proof to a defendant in a criminal case. *United States* v. *Demetree*, 207 F. (2d) 892, 894 (CA 5); *United States* v. *Caserta*, 199 F. (2d) 905, 907 (CA 3).

This shifting of the burden of proof is the reason petitioner asks this Court to examine the record herein, on the basis that "we have never hesitated to examine a record to determine whether there was any *competent* and *substantial* evidence fairly tending to support the verdict." *Mortensen* v. *United States*, 322 U. S. 369, 374 (emphasis added). Far from being "competent and substantial," petitioner feels that the evidence here clearly violates the rule laid down in *Brinegar* v. *United States*, 338 U. S. 172, 174, that:

> "Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common—law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property."

The significant feature of the application of these principles to the trial of net worth cases is that the Court of Appeals have but little difficulty when the proof is partly direct and partly circumstantial, but that these principles are widely and divergently interpreted when, as here, the proof is entirely circumstantial. 38 *Georgetown Law Jour-*

nal, 262. The "competent and substantial" (*Mortensen* v. *United States, supra*) evidence rule is difficult to apply in net worth circumstantial evidence cases, because of the limited function of circumstantial evidence, as set forth in *Tot* v. *United States*, 319 U. S. 468, 467:

> "The jury is permitted to infer from one fact the existence of another essential to guilt. In many circumstances courts hold that proof of the first fact establishes a basis for inference of the existence of the second."

In circumstantial evidence net worth cases, the prosecution of necessity must enlarge the function of the circumstantial evidence beyond the rule of the *Tot* case.

The evidence in the instant case is a perfect example of this last statement. Respondent summarized the evidence on page 4 of its Brief in Opposition, and characterized the evidence on page 12 of that Brief as the income tax filing history, the borrowings, the mortgage foreclosures, and admissions. Petitioner will here follow that summary, which also appears in the Statement of Facts herein.

1. Loan—(Ex. 4A, R. 15, 722). The fact is proved that petitioner borrowed $550.00 in 1931. From this fact the jury is asked to infer a financial condition of petitioner which excluded his possession of any readily convertible assets, and then the jury is asked to assume that this status persisted until December 31, 1945. So, from that assumption, the jury may infer the fact (sic) that petitioner had no cash on hand during these fifteen years, from which last inferred fact follows an assumption that the net worth increase in the mid 1940's resulted from unreported income. These inferences and assumptions are a far cry from the rule that possessions of the fruits of a crime two weeks after its commission raises an inference of guilt. *Wilson* v. *United States*, 162 U. S. 613.

2. Foreclosures.

A. The fact was proven that in 1934 (Ex. 28, R. 191, 743) foreclosure was had against the Bedford Avenue property, which petitioner had sold in July 10, 1928, with the purchaser assuming the mortgage (R. 185). Petitioner, because of the assumption of mortgage, was a party to the suit, but paid nothing, and no attempt was made to collect from petitioner (R. 183-185, 440), and petitioner had no interest in the property (R. 440). The fact was also proved that in 1934 (Ex. 29, R. 191, 744) foreclosure was also had against the Sheldon Avenue property, which petitioner had sold on April 16, 1929 (R. 182), and had to reacquire to attempt to protect his savings (R. 444). Here again was an assumption of mortgage by the purchaser (R. 182), but here again was no collection, actual or attempted, against petitioner (R. 438), or no interest in the property after foreclosure, or throwing of good money after bad (R. 441). From these facts, the jury must infer that it would have been financially beneficial to petitioner to pay off the mortgages in the declining real estate market (R. 441) of the 1930's, but that petitioner could not pay off the mortgages because of a financial condition (in 1934) which rendered him unable to do so. The jury must then assume that this condition persisted for eleven years, so that it can then infer the final fact that petitioner had no cash until December 31, 1945.

B. Nelson Road—The proven fact is that petitioner acquired this property in trade on March 15, 1929, assuming a $9,000.00 mortgage thereon (R. 181), and enjoyed the use of it until the foreclosure in 1936 (Ex. 6A, R. 18, 726; R. 490). Petitioner was dissatisfied with the property (R. 490 et seq.), and received a full satisfaction of his obligation for a nuisance payment of only $100.00 (Ex. 6A, R. 726). From this fact the jury is again asked to make the same lengthy string of inferences and assumptions as in the

other two foreclosures, despite the fact that the prosecutor tried to prejudice the jury by suggesting a contradictory, but more logical inference, to the effect that petitioner preferred keeping his assets intact to paying his creditors (R. 485). There is no attempt to show that retention of the property would benefit petitioner financially.

3. Levy of Execution—The fact is proven that in 1936 petitioner suffered a judgment for $13.76 in the Columbus Municipal Court, and the bailiff made returns of execution levied of no goods found. The bailiff was not called to testify, so the record is silent on whether or not this was a mere office return, with no attempt by the bailiff to enforce the writ. Since other proof offered by the prosecution (Ex. 2C, R. 37, 693; Ex. 2N, R. 38, 703; Ex. 7, R. 19, 732) conclusively shows that petitioner did possess property during this period, and drew a salary regularly, the jury would have no choice but to infer that no search was made by the bailiff, and that defense testimony was truthful in that the debt was ignored because no attempt was made to collect this small sum (R. 360).

4. County Tax Returns—The fact is that petitioner did not file county tax returns on personal property from 1938, and in October of 1947 filed delinquent returns (Ex. 30, fol. 1124, R. 759). The inference which respondent would draw from this fact, namely, that petitioner owned no such property, is precluded by proof which the prosecution offered (Ex. 2N, R. 38, 703; and Ex. 30, the very exhibit relied on), show conclusively that he did possess property, and that he simply failed to file returns.

5. Income Tax Returns—Petitioner's filing records (Ex. 1F, fol. 13, R. 684) was placed in evidence, so that the jury could infer from it that petitioner could not have earned sufficient income to permit him to accumulate any cash between 1924 and 1945. Of course, petitioner's pre-1943 returns had long since been destroyed according to the

custom with individual returns, and the Internal Revenue Records merely indicated a tax paid, a non-taxable return, or no return (Ex. 1F, fol. 13, R. 684). The prosecution attempted to reconstruct petitioner's income (R. 513 et seq.), but a Revenue Office prosecution witness admitted (fol. 22-23) that it was impossible to figure backwards in this fashion, and that the amount of tax assessed or paid would not reflect the amount of income received or paid.

Respondent urges the astounding inference that from 1916 to 1943 petitioner was completely truthful and free from error in his reporting of income, but that he underwent a miraculous transformation on March 15, 1944, which caused him to conceal and fail to report $13,404.71 on that date, $20,156.82 a year later, $18,091.41 a year after that, and the amazing sum of $37,553.86 on March 15, 1948, despite the fact that he had known since September 25, 1947, that he was being investigated for income tax deficiencies (R. 407), and despite the fact that on October 10, 1947 the agents told him that they would take a "slice" of the contents of his safety deposit box (R. 415).

6. Loan Application—This exhibit is discussed at length in part I B below.

7. Corporate Dissolution—In 1941 the Buckeye Corporation dissolved voluntarily under the Ohio statutes (R. 66-67) because the three men who comprised the corporation did not jointly possess the funds required to finance the particular type of business which was conducted (R. 30). Petitioner singly purchased the assets and carried on the business quite successfully, converting it into a different type of tailoring operation (R. 44-46), with resultant economies. The only inference which can be drawn here is that the three men who each held one third of the corporate stock could not provide the financing which the corporation required (R. 428-431, 449), but that one of them alone was able to continue the operation of the business.

8. Bookkeeping--The jury is asked to infer that petitioner was completely exact in his reporting of income up to 1944, but that his wife, who took over the bookkeeping in late 1944, after Mrs. Appel married and resigned (R. 38-40, 278), was dishonest, and caused the understatement. Of course, her work could have no effect whatsoever on the starting point cash position, and the only fault found with her work was in the Friedberg Loan entries, which were admitted to be a mere formal error, of no effect on reported income (R. 169).

9. Friedberg Loan Entries—Petitioner has already pointed out that the sole fault here was one of accounting technique. The only way to arrive at the gross incomes reported for tax purposes in 1945, 1946 and 1947 is to add the Friedberg Loan totals to the cash receipts book totals for those years. Special agent Clager admitted that the sums carried under the Friedberg Loan entries had actually been reported as income (R. 169).

10. Opinion Evidence—This is the only testimony which dealt directly with the issue of the starting point cash position. No attempt was made to qualify special agent Clager as an expert, and he was not an expert accountant (R. 92-93, 136-137). He could scarcely be called upon to interpret books and records, but, shockingly, over strenuous objection, he twice offered his personal opinion why petitioner had no cash on hand prior to December 31, 1945, the sole important factual issue which the jury had to decide. In point II hereof petitioner will show in detail why such opinion should never have been offered as if it were an evidentiary fact.

Petitioner has outlined the evidence upon which respondent relies, not to have it weighed, but to demonstrate how the starting point evidence fails to meet the test of "long experience in the common-law tradition," as in *Brinegar* v. *United States*, supra, or the "competent and substantial"

test of *Mortensen* v. *United States*, supra. The dissimilarity between the instant case and *United States* v. *Johnson*, 319 U. S. 503, 516-518, is striking in three respects. On the key issue of "source of unreported income," a "voluminous body of lurid and tedious testimony . . . amply justified the jury in finding" that Johnson was proprietor, not patron, while here the special agent admitted that the Friedberg Loan items had been reported as income. Proof of excessive expenditures "is enough to sustain the judgment against Johnson," while expenditures were not an issue in this case. "Meticulous proof" showed that Johnson had a source of concealed income, that his expenditures were excessive, and that the gambling houses made profits, the amounts being unknown. An inference was permitted that Johnson concealed income, without proof of the exact amount concealed. Here is no concealed source of income, no claim of excessive expenditures, but merely inferences on assumptions which are based on inferences. This evidence is not the inferring of a second fact from the proof of the first fact, as in *Tot* v. *United States*, supra. Here a fact leads, in a loose, vague, way to an inference. The *inference* must be *assumed* to continue to exist in unchanging form, for as long as fifteen years. From that assumption is drawn the final inference, that of no cash on hand, and that the increase in net worth resulted from concealed income. Not only is the original proven fact susceptible to many and conflicting inferences, but the element of remoteness renders the inference wholly unreliable.

This is the very presumption which, as Wigmore points out (*Wigmore On Evidence*, 3rd Ed., Vol. II, Sec. 437), weakens as the time interval lengthens. As the assumption is extended over a long period of time Wigmore illustrates, either the proponent of the rule must offer additional proof to justify the continuation of the assumption, or the opponent must assume the burden of proof. Since the first

alternative is lacking here, petitioner finds himself, in a criminal trial, forced to assume the burden of proof. This case presents a perfect opportunity for this Court to re-state the rule it laid down in *Maggio* v. *Zeitz*, 333 U. S. 56, 65:

> "Language can, of course, be gleaned from judicial pronouncements and texts that conditions once existing may be presumed to continue until they are shown to have changed. But such generalizations, useful enough, perhaps, in solving some problem of a particular case, are not rules of law to be applied to all cases, with or without reason."

Petitioner asks this Court to analyze this evidence under the rule of *Lustig* v. *United States*, 338 U. S. 74, 77:

> "But the question before us is not foreclosed by the respect to be accorded to a ruling on an issue of fact by the trial court until analysis discloses that the ruling was merely on an issue of fact and that no issue of law was entwined in the ruling."

An issue of law is most grievously entwined in this evidence. The legal issue is whether the Government can sustain net worth convictions which are based on the vaguest of inferences drawn solely from assumptions which rest on remote circumstantial evidence. The problem is highlighted in an opinion by the most conviction-minded of the Court of Appeals in *Rollinger* v. *United States*, 208 F. (2d) 109, 113 (CA 8):

> "It remains to consider the contention urged by defendant that the court should have granted his motion for acquittal, because the evidence was *as consistent with his innocence as with his guilt.* That was a question of fact to be determined by the jury on consideration of all the evidence and circumstances in the case." (Emphasis added.)

In other words, if any evidence of guilt can be drawn from circumstantial evidence, no matter how many diver-

gent inferences may be drawn therefrom, the jury has free rein, and the *defendant must assume the burden of proving himself innocent at his peril.* This harsh and unnatural rule is carried to its fruition in *Smith* v. *United States,* 210 F. (2d) 496, 500 (CA 1) (No. 52 on the dockets of this Court), wherein it was said that the failure of the defendant to assume the burden of proving his innocence may be considered by the jury in reaching its verdict. In support of this strange proposition are cited *Schuermann* v. *United States,* 174 F. (2d) 397 (CA 8); *Jelaza* v. *United States,* 179 F. (2d) 202 (CA 4); and *Remmer* v. *United States,* 205 F. (2d) 277 (CA 9), reversed on other grounds in 347 U. S. 227. But 18 U. S. C., Section 3481, and *Bruno* v. *United States,* 308 U. S. 287, are conspicuous by their absence from this opinion.

On the other hand, decrying this "shifting of the burden of proof," this undue zeal to facilitate the collection of taxes for the revenue agents, are the Courts for the Third, [*United States* v. *Caserta,* 199 F. (2d) 905], Fifth [*Ford* v. *United States,* 210 F. (2d) 313], Sixth [*Dawes* v. *United States,* 177 F. (2d) 255, the question not even being discussed in the one page memorandum opinion in the instant case], Seventh [*United States* v. *Fenwick,* 177 F. (2d) 488], and Tenth [*Morgan* v. *United States,* 159 F. (2d) 85] Circuits. In substance, these Courts follow the ruling in *Bryan* v. *United States,* 175 F. (2d) 223, 227 (CA 5):

> "The evidence, being circumstantial, must exclude every reasonable hypothesis other than the guilt of the defendant."

The Court for the Ninth Circuit would grant a motion for acquittal where, as a matter of law, reasonable minds agree that a reasonable hypothesis other than of guilt could be drawn from the evidence. *Remmer* v. *United States,* 205 F. (2d) 277, 288, reversed on other grounds in 347 U. S. 227.

Such a rule, as is lamented in some quarters, does place the burden on the Government, but that is precisely where American jurisprudence locates the burden in criminal cases. A reviewing court may not shirk its duties in reviewing circumstantial evidence, just to facilitate tax collection. It must be pointed out that the six courts which base their rule on the constitution and on "long experience in the common-law tradition" (*Brinegar* v. *United States*, supra) have no difficulty in sustaining convictions where the investigating agents have produced "competent, substantial" evidence. See *Demetree* v. *United States*, 207 F. (2d) 892 (CA 5); *Brodella* v. *United States*, 184 F. (2d) 823 (CA 6); *United States* v. *Yeoman-Henderson*, 193 F. (2d) 867 (CA 7). The situation appears quite apt for a quotation which is found in *On Lee* v. *United States*, 343 U. S. 759, 761:

> "There is a great deal of laziness in it. It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence."

See also recent case of *United States* v. *Riganto*, 121 Fed. Supp. 158 (DC-Va.).

B.

Exhibit 7 Is Not an Admission, Susceptible to Only One Inference, But Is Merely an Item of Circumstantial Evidence from Which an Inference Must Be Drawn Only in Accord with Long Established Rules of Criminal Procedure.

The only exhibit offered on the starting point cash position, which even mentions dollars and cent items, is an F.H.A. Loan Application (Ex. 7, R. 19, 732). On October 20, 1939, petitioner applied for an F.H.A. loan of $7,600.00 to the National Life Insurance Company, and supplied a financial statement, to justify the granting of the loan. The critical item, in the view of the respondent, is the first line of the statement, where the printed form reads

"Bank accounts." Someone inserted, with a typewriter, after these words, the additional words "on hand," and the sum of $150.00 in figures was inserted. Respondent treats this exhibit as an admission of only $150.00 cash on hand on October 20, 1939.

An examination of the cases which rely on admissions to establish the starting point net worth shows this exhibit to bear no resemblance at all to the proof offered in those cases. In *United States* v. *Hornstein*, 176 F. (2d) 217, the Seventh Circuit affirmed a conviction in which the net worth computation relied upon the figures used by defendant in his tax returns for cost of goods sold. In *Barcott* v. *United States*, 169 F. (2d) 929, the Ninth Circuit affirmed a conviction wherein, after the agents had accumulated damaging evidence, the defendant made repeated offers to bribe the agent. In *United States* v. *Chapman*, 168 F. (2d) 997, the Seventh Circuit affirmed because of a corroborated confession. In *Brodella* v. *United States*, 184 F. (2d) 823 (CA 6), the defendant made a claim to the agent of having received $140,000.00 from an estate, but on investigation thereof admitted it was an error and should be deleted, and then later claimed that the amount of $60,000.00 should be included. It was clearly established that the books of defendant failed to reflect large liquor purchases. In *Gariepy* v. *United States*, 189 F. (2d) 459 (CA 6), it was clearly established that when the defendant began his medical practice he was heavily in debt. *Bell* v. *United States*, 185 F. (2d) 302 (CA 4), is based on admissions of the taxpayer to the investigating agents. This last type of admission is the one most commonly found. Equally strong would be a voluntary petition in bankruptcy, or a graduation from school and acceptance of one's first employment.

The significant feature of these admissions is that they all are admissions of a *maximum* sum possessed on a given date, that the taxpayer owned *no other assets* on that date.

Either the circumstances surrounding the act, or the reason behind the request for the confession, required those taxpayers to list every asset they possessed.

Here the situation is reversed. The prime security for the loan applied for in Exhibit 7 is a first mortgage on real estate located at 208 South Stanwood Road (R. 732), and the financial statement was a mere formality. Whether petitioner had $9,200.00 or $92,000.00 is immaterial to the F.H.A., so long as the property at 208 South Stanwood Road appraised properly.

In addition, the jury is precluded from inferring that the financial statement listed every item of petitioner's assets, because government exhibit 2N (R. 38, 703) proves that petitioner then owned securities through Vercoe and Company, while Item IA(3)(b) on the financial statement (R. 732B) fails to list any securities. Also, the insertion of the typewritten words "on hand" after the printed words "Bank Accounts" renders the precise significance of the $150.00 figure uncertain.

All of these facts render most probable that inference from this exhibit which was actually testified to by petitioner (R. 478), that he merely listed sufficient assets to justify the granting of the loan.

Respondent confuses the function of this exhibit. It probably is admissible in evidence as an item of circumstantial evidence which goes generally to the issue of cash on hand. *United States* v. *Potson*, 171 F. (2d) 495 (CA 7). The exhibit therefore, is not an admission from which the jury is required to draw only one inference. To the contrary, the value of this exhibit as an item of evidence is limited to that inference which a jury could reasonably draw therefrom, taking into account that the loan is to be secured by a first mortgage, that the cash item is listed in a confusing fashion, that the statement clearly did not include all the assets. And if, arguendo, the exhibit might support an

inference of low cash position, may the jury assume that such status continued unchanged from October 20, 1939, to December 31, 1945? The record is singularly lacking in cash position evidence for that period of over six years. A reviewing court must conclude that the Loan Application is merely a portion of the general starting point cash position circumstantial evidence, and is just as insufficient and remote as the rest of the evidence.

II

THE OPINION OF SPECIAL AGENT CLAGER AS TO WHY PETITIONER HAD NO CASH ON HAND WAS CLEARLY INADMISSIBLE, BECAUSE HE WAS NOT QUALIFIED AS AN EXPERT, AND BECAUSE HE DID NOT ANALYZE BOOKS, BUT ARGUED FROM THE ENTIRE SET OF CIRCUMSTANTIAL EVIDENCE.

Special Agent Clager was asked on cross-examination to state "yes" or "no" to whether his net worth schedule (Ex. 2, R. 38, 691) credited cash to the petitioner in 1941 (R. 138). Clager would not give the simple answer requested, but sparred for several pages of record, and finally, over strenuous objection, replied:

> "I did not include currency at the end of the year 1941, because my *investigation* disclosed no evidence which would permit me to put such a figure of currency in my schedule" (R. 139). (Emphasis added.)

The Court persisted in its error, and over the renewed objection of defense counsel, permitted Clager to testify, as follows:

> "Based on the following evidence I did not include currency in my financial statement. . . ." (Narrative of the circumstantial events which transpired in the 1930's.)

> "And so, for those reasons, I could see no reason why I should give consideration, or rather, include in this statement which I have prepared an amount of currency which he states he would have" (R. 188-190).

It should be noted that this personal opinion is the only cash position evidence offered by the prosecution from the signing of the Loan Application on October 20, 1939, until cash was credited at the end of 1945.

The prosecution had made no effort to qualify Clager as an expert on anything (R. 92). Defense counsel ascertained that Clager was certainly not an expert accountant. He graduated from college in 1940 (R. 137), and military service evidently intervened, for he did not join the Bureau of Internal Revenue until February 4, 1946, about one and one half years before he began the investigation of this petitioner (R. 137). He was not a certified public accountant, even in 1951 (R. 137). Therefore, it is highly doubtful whether Clager could be permitted even to analyze books and records for the jury. But Clager went far beyond such testimony.

He offered, as if it were an evidentiary fact, his personal opinion that petitioner did not have any cash until December 31, 1945. This is not an agent testifying to his computations of income and expenditures, based on documentary evidence, as in *United States* v. *Johnson*, 319 U. S. 503, 519, or *Stevens* v. *United States*, 206 F. (2d) 64 (CA 6). In the instant case, the sole important unstipulated factual issue for the jury to determine is whether the collection of circumstantial evidence, inference and assumption proves beyond a reasonable doubt that petitioner lacked cash on hand until December 31, 1945. Clager brashly offered his opinion that there was no cash, and urged the jury to accept his personal opinion as if it were an evidentiary fact.

Not only is the admission of such testimony shocking from the standpoint of the rules of evidence, but it is even worse from the point of view of trial procedure. It would be perfectly proper for the Government counsel, in fact his duty, to argue the evidence to the jury, under proper instructions, after all of the evidence is submitted. But here the chief government witness, before the defense is heard from, gives his opinion as if it were a fact, and argues that fact to the jury. Even the attempt of defense counsel to move for a mis-trial was of no avail (R. 139). The need for the prosecution to fill the evidential gap between October 20, 1939 (Ex. 7) and December 31, 1945, serious as it is, is no excuse for such outrageous trial procedure. The opinion testimony of Clager should clearly have been ruled out, and the unresponsive answer of deputy collector Nerny (R. 205), that he concurred in Clager's opinion, is equally improper, and equally insufficient to fill the evidential gap from 1939 to 1945.

This "whole case" turned on the jury's determination of cash position at the starting point. This opinion testimony, offered by non-experts, clearly violates the rule of *United States* v. *Spaulding,* 293 U. S. 498, 506:

> "Moreover, that question is not to be resolved by opinion evidence. It was the ultimate issue to be decided by the jury upon all the evidence in obedience to the judge's instructions as to the meaning of the crucial phase and other questions of law. The experts ought not to have been asked or allowed to state their *conclusions on the whole case.*" (Emphasis added.)

III

THE ERROR IN THE SUPPLEMENTAL CHARGE MAY BE CONSIDERED ON APPEAL ALTHOUGH NOT BROUGHT TO THE ATTENTION OF THE TRIAL COURT.

The supplemental instruction to the jury raises the question of the relationship between Rule 30 and Rule 52(b) of the Federal Rules of Criminal Procedure, a question which has not been decided by this Court.

After four weeks of trial, and after the jury had deliberated on Thursday and Friday, January 10 and 11, 1952, the trial court called the jury in for the noon recess. Without request from either side, the Court said (R. 654):

> "The Court will stand in recess until one-thirty. The Court may say to the jury at this time that I want you to make an honest and sincere effort to reach an agreement as to the merits of this case. I do not want you to shirk your duty. I want you to be fair to the Government, The United States, and the defendant. Nevertheless, this case has taken many days to try, and I hope you will make a sincere effort to *compromise and adjust your differences* and reach a verdict, if possible." (Emphasis ours.)

The jury apparently took the suggestion from the court, and within an hour and forty-five minutes returned with a compromise verdict of not guilty for 1944, and guilty for 1945, 1946 and 1947.

The issue presented is the effect of Rule 30 of the Federal Rules of Criminal Procedure, when Rule 52(b) also is applicable. Specifically, where a supplemental, rather than a regular, instruction is given to the jury, need an exception be taken, or does Rule 52(b) serve in the place of a formal exception? To state the question practically, should petitioner be denied a new trial because his trial counsel failed to object to this off-the-cuff charge, and because trial

counsel, in arguing a motion for new trial, first claimed this obvious error, and then waived it (R. 662, 663).

The District Judge apparently recognized the error, for during argument on the motion for acquittal or a new trial, he inquired of defense counsel at least five times (R. 661-663) whether error was claimed.

Rule 52(b) has an interesting history. While the rule had always been, normally, that exception must be taken to the charge if error is to be prosecuted thereon (*Johnson* v. *United States*, 318 U. S. 189, 200), there had long been exceptions to that rule. *United States* v. *Atkinson*, 297 U. S. 157; *Clyatt* v. *United States*, 197 U. S. 207, 221, 222. In *Screws* v. *United States*, 325 U. S. 91, 107, this Court added an additional exception to the rule, viz: that the charge does not submit to the jury one of the essential elements of the offense charged. In *Bollenbach* v. *United States*, 326 U. S. 607, the defense counsel did not except to one portion of the supplemental charge, and merely excepted to another portion of the supplemental charge, without stating his grounds with particularity. This Court reversed, holding that the supplemental charge was prejudicial, in permitting a conviction to be based on a presumption of just a few day's duration, which "offends reason."

Two months later the Federal Rules of Criminal Procedure became effective, containing both Rule 30 and Rule 52(b). The Notes of the Advisory Committee state that Rule 52(b) is a codification of existing law.

Quite rapidly, however, the Courts of the various circuits struck out on their own, and did not follow the "existing law," which was codified as "plain errors or defects affecting substantial rights." In *Cave* v. *United States*, 159 F. (2d) 464, 469, the Eighth Circuit set up the test of "basic and highly prejudicial." This same Court had, shortly before, set up the requirement that the error result in a "miscarriage of justice." *Lotto* v. *United States*, 157 F. (2d) 623, 630. In *United States* v. *Sherman*, 171 F. (2d)

619, 624, the Court for the Second Circuit admitted that the charge might have required reversal, but refused to notice such assigned error because no exception had been taken to the charge. In *Berenbeim* v. *United States*, 164 F. (2d) 679, the Court for the Tenth Circuit refused to consider whether a charge shifted the burden of proof, merely because an exception had not been taken. And the Court for the Sixth Circuit, in *Jackson* v. *United States*, 179 F. (2d) 842, refused to consider that the charge referred to a different, related offense, for the reason that such review was not "in the public interest."

A correct interpretation of Rule 52(b) is found in that line of cases of which *United States* v. *Raub*, 177 F. (2d) 312, 315 (C. A. 7), is an example:

> "It appears to be generally established now that—Rule 30 notwithstanding—in a criminal case involving life or liberty of a defendant, an appellate court may notice plain and serious prejudicial error in instructions even though it was not called to the attention of the trial court."

The instant case also presents an additional problem, beyond the question of the relationship of the two rules. The objectionable words here are not part of an instruction by the Court, are not part of a charge as it is known in the Rules of Criminal Procedure. Here the Court was not giving a supplemental instruction on the meaning of reasonable doubt, as in *Allen* v. *United States*, 164 U. S. 492, 501, nor is it reviewing the evidence and the law to assist a tired jury, as in *United States* v. *Allis*, 155 U. S. 117. The Court merely called in the jury for the noon recess, told the jury to be back at 1:30, and then unprovokedly launched into its request to "compromise and adjust your differences," after stating that the case had taken many days to try (R. 654). This is no charge, as a charge is commonly known, and it is highly doubtful whether this

gratuitous and prejudicial suggestion enjoys any of the protection afforded by Rule 30, Federal Rules of Criminal Procedure.

But under either theory, these words are highly prejudicial and extremely harmful. The trial Court evidently considered them erroneous, because he inquired at least five times whether this point was being urged in support of the Motion for New Trial or Acquittal (R. 661-663). The case had begun on the basis that the Friedberg Loan entries constituted specific proof of concealment of income, and the jury never did really understand what this mass of testimony amounted to. The jury did not know quite how to evaluate a personal opinion of the chief representative of the government that petitioner was guilty. Cf. *Mora* v. *United States*, 190 F. (2d) 749 (C. A. 5), wherein a charge expressly withdrawing testimony from jury consideration could not cure the harm which resulted from its admission. The four and one half weeks of trial had resulted in the discharge of one juror (fol. 289), and in weariness for the remaining eleven jurors. Therefore, after deliberating (R. 653-654) Thursday afternoon and all Friday morning, it is no wonder that the jury returned at 3:15 on Friday afternoon with a compromise verdict, to avoid going into the week end. The jury acquitted for 1944, and convicted for 1945, 1946 and 1947, *in a net worth increase case wherein the starting point cash position was the only unstipulated important factual issue.* The only evidence which could explain such a finding has no relationship whatsoever to cash position. The only explanation for such a finding lies in the supplemental suggestion, which following the confusion in the minds of the jurors, and the weariness in their bodies, "cumulated" in a purely compromise verdict. Cf. *United States* v. *Donnelly*, 179 F. (2d) 227 (C. A. 7):

> "We feel that the errors were not harmless, Rule 52, Federal Rules of Criminal Procedure; *Bollenbach* v.

United States, 326 U. S. 607; *Bihn* v. *United States*, 328 U. S. 633, and conclude that their *cumulative* effect was to prejudice substantial rights of the defendant, to the end that the judgment of guilty herein cannot be sustained" (emphasis added).

As this Court said in *Glasser* v. *United States*, 315 U. S. 60, 67:

> "In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances could not be ground for reversal, cannot be brushed aside as immaterial since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt."

CONCLUSION

The conviction is based solely on strained inferences from remote circumstantial evidence, and on unwarranted assumptions which shift the burden of proof. This case, petitioner submits, should be reversed on this ground, and, because motions for acquittal were improperly overruled, final judgment should be entered in favor of petitioner.

The opinion testimony of the special agent was not the testimony of an agent, and was a pure conclusion on an ultimate fact. The supplemental suggestion of the trial Court on compromise was highly prejudicial. Reversal, petitioner submits, should follow on both these grounds, which are procedural, and would, therefore, require merely a remand.

Respectfully submitted,

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